U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[redacted]
Georgeann R.,[1]
Complainant,

v.

Scott Bessent,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2023004363

Agency No. IRS-22-0868-F

DECISION

On July 27, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 26, 2023 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether the Agency correctly found that Complainant was not subjected to discrimination and reprisal as alleged.

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Adjudicator, GS-07, with the Agency's Human Capital Office, Personal Security Service, in Memphis, Tennessee.

On December 14, 2022, Complainant filed an EEO complaint, which was subsequently amended, alleging that the Agency discriminated against her, based on her disability (asthma, severe allergies and chronic urticaria) and reprisal (prior protected EEO activity) when:

1. from August 10, 2022, and thereafter, management failed to provide Complainant with a reasonable accommodation;
2. on August 31, 2022, Complainant's manager denied her request to be converted to telework status;
3. on August 24 and 25, 2022, management placed Complainant in Absent Without Leave (AWOL) status;
4. on January 24, 2023, Complainant was denied annual leave; and
5. on January 26, 2023, Complainant was charged AWOL.

None of the management officials named in Complainant's prior protected EEO activity were the officials in the current EEO action. Complainant's first-level supervisor (Supervisor1) and second-level supervisor (Supervisor2) became aware of the instant EEO complaint in October 2022, when an EEO Counselor reached out to request an interview.

Complainant stated that she experiences complications from asthma, severe allergies, and chronic urticaria. Complainant is limited to no chemical odors or strenuous activity. During the time period relevant to the instant complaint, Supervisor1 was aware of Complainant's medical condition; however, Supervisor2 was not.

Complainant performs administrative work with the use of an Agency laptop computer. Complainant reviews and evaluates completed background investigations and elicits pertinent information and material facts to make a preliminary suitability adjudicative decision to retain an employee. Complainant also assists in reviewing and recommending adjudicative action on personnel background investigations which may include investigation documentation from investigative sources on all case types.

Denial Reasonable Accommodation - Claim 1

Complainant asserted that on August 10, 2022, she verbally asked Supervisor1 to telework four to five days a week; to not report to the office for a full day for work; and the use of a monitor for her desk. Supervisor1 asserted that Complainant only requested a monitor on August 10, 2022. Supervisor1 informed Complainant that he would bring in a loaner computer monitor for her to use in the office and that he had ordered a new computer monitor for Complainant when working in the office.

The record shows that within a week or two after the August 10, 2022 conversation with Supervisor1, Complainant related to him that she intended to request a reasonable accommodation (including telework) related to her medical conditions. Complainant contends that management did not immediately approve her telework request, because her medical note was sanitized for her medical condition. In addition, Complainant was still on a 90-day probationary period and she was required to report to the office six days per pay period.

The documentary and testimonial evidence in the record shows that on or about September 2, 2022, Complainant submitted a formal request for accommodation to telework three days per week and report to the office one day per week to limit her exposure to aerosol sprays and perfumes in the office that triggered her medical condition.[2] On or about September 1, 2022, Supervisor1 approved full-time telework as a temporary accommodation while the formal reasonable accommodation request was pending.[3]

The record shows that on November 21, 2022, management granted the alternative accommodation of providing a HEPA filter for Complainant's office; one-to-three days of Family and Medical Leave Act-protected leave or other leave when her condition flared; and approval of three days of telework and one day in the office per week. Complainant accepted this accommodation on November 15, 2022.

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[2] Complainant disputes this and asserts that she actually requested an accommodation on August 16, 2022.

[3] Complainant contends that she has more control over her environment when working at home resulting in fewer flare-ups. Complainant states without the accommodation, flares-ups cause major cognitive issues, rashes, inflamed skin, burning sensation, shortness of breath, restricted breathing, chest pain, itching, double vision, excessive coughing, chest tightness, and tongue swelling.

Telework - Claim 2

Complainant had an approved telework agreement on file dated July 21, 2022. The telework agreement required Complainant to report to the office three days per week during her 90-day training period, which was a requirement for all newly hired Personnel Security Assistants and Adjudicators. Supervisor1 stated that following completion of the training period, he modified the telework agreement to one day a week in the office. On or about August 31, 2022, Supervisor1 verbally approved a temporary accommodation of 100 percent telework pending the decision on Complainant's reasonable accommodation request.

AWOL/Leave - Claims 3-5

Supervisor1 asserted that during the relevant time frame, Complainant's work performance, behavior, and attendance were concerning and addressed often verbally and in writing. Supervisor1 also contended that Complainant was reminded to complete daily work assignments and often her work had to be reassigned to other security specialists. Supervisor1 stated that while assigned to the Electronic Questionnaire for Investigation Processing (e-QIP) Call Center, he received several emails and telephone calls about Complainant's lack of performance and attendance during her tour of duty. He also affirmed that Complainant consistently refused to follow management directives, instructions, a direct order memorandum, leave procedures, requests for information, recording time reminders, and her chain of command.

On August 23, 2022, at 5:40 a.m., Complainant emailed Supervisor1 requesting 10 hours of annual leave. Supervisor1 responded approving the request for the day but reminded Complainant of the leave request policy and also that he expected to see her the rest of the week. Complainant did not report to work on August 24 and 25, 2022 and was charged 10 hours AWOL for each day.

Complainant asserted that Supervisor1 denied her request for annual leave or to work from home, because it was requested via email instead of verbally. Complainant explained that she was under a doctor's care because she had been in contact with someone who tested positive for COVID-19, and her doctor instructed her to telework. Complainant stated that Supervisor1 began to chastise her for making her requests from her personal email address and demanded that she report to the office as soon as possible.

Supervisor1 stated that Complainant was charged AWOL for August 24 and 25, 2022, because she failed to comply with management directives and IRS leave policy when requesting annual leave. In addition, Supervisor1 noted that Complainant was never denied sick leave. Supervisor1 contended that Complainant was reminded on several occasions verbally and in writing to adhere to the leave policy, submit an annual leave request in advance, and execute leave once approved. According to Supervisor1, Complainant would not answer or return calls to her manager once she was contacted about the leave request.

Complainant stated that, because she was unable to work on January 23 and 24, 2023, she sent an email to Supervisor1 on January 23, 2023, requesting 10 hours of annual leave that she would amend if anything changed. On January 24, 2023, Complainant sent Supervisor1 another request for 10 hours of annual leave. Complainant asserted that she followed the Agency's leave policies, because annual leave must be requested verbally or in writing and, whenever possible, in advance.

According to Complainant, on January 23, 2023, Supervisor1 responded reminding her that annual leave must be submitted in advance and approved. Complainant stated, Supervisor1 directed her to call him, because he could not leave her a message due to her voicemail being full. Complainant stated on January 26, 2023, she received an AWOL notice. Complainant asserted that she had more than 80 hours of annual leave and she followed the process; therefore, her annual leave should have been approved.

Supervisor1 denied Complainant's annual leave request explaining that employees are required to submit an annual leave request via calendar invite to their manager in advance and execute once approved by management. On January 23, 2023, Supervisor1 notified Complainant that her leave was denied stating: "You have been reminded numerous times that annual leave requests must be submitted in advance and executed once approved by management. I tried to reach you at the number . . . you provided; however, you did not answer, and I could not leave a voicemail due to your [voicemail box being] full. Also, I sent you a text from my cell. Please give a call ASAP for we can discuss this leave request." Since leave was denied and Complainant did not report to work, on January 26, Supervisor1 charged Complainant AWOL for January 23 and 24.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge.

In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the decision, the Agency determined that Complainant was initially accommodated with a computer monitor and, subsequently, temporary 100 percent telework while her accommodation request was pending. Complainant was provided alternative accommodations of a HEPA filter for her workstation and FMLA leave for one-to-three days when her condition flared up.

As to her claim that she was denied telework, Agency officials stated that Complainant had a telework agreement in place dated July 21, 2022. Complainant was required to report to the office three days per week during her 90-day training period, which was a requirement for all newly hired Personnel Security Assistants and Adjudicators. S1 asserted that following completion of the training period, he modified the telework agreement to one day a week. S1 stated that on August 31, 2022, he verbally informed Complainant that she could temporarily telework 100% pending the reasonable accommodation decision. On September 1, 2022, he requested Complainant sign the telework agreement; however, Complainant refused. Notwithstanding, Complainant was allowed to telework per the verbal authorization.

Finally, regarding her leave claims, S1 affirmed that Complainant was charged AWOL or had leave denied on the dates in question after she failed to follow Agency leave policies despite numerous reminders.

The Agency concluded that Complainant failed to show that Agency management's reasons for its actions were pretextual. As a result, the Agency found that Complainant was not subjected to discrimination or reprisal as alleged.

The instant appeal followed.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) she is a member of a protected group; (2) she suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

Here, the Agency does not dispute that Complainant is a qualified individual with a disability within the meaning of the Rehabilitation Act.

However, we find insufficient evidence to establish a prima facie case of disability discrimination or reprisal with respect to all of Complainant's claims. The record is devoid of similarly situated comparator employees, outside Complainant's protected classifications who were treated more favorably. In addition, other than Complainant's bare, uncorroborated assertions, the record is devoid of evidence of any link between membership in the protected class and the adverse employment action.

Notwithstanding, we find that management articulated legitimate, nondiscriminatory/retaliatory reasons for the employment actions alleged. Specifically, the record shows that to the extent that management failed to provide Complainant with telework between July 2022 through mid-August 2022, the record shows that management needed Complainant in the office more often since she was in a probationary status and still required in-person training. To the extent that management failed to provide Complainant with telework in late August 2022, the record supports the finding that Complainant did not request a reasonable accommodation as early as she asserts. In addition, once management was aware of Complainant's intention to request a reasonable accommodation, management assisted Complainant in obtaining to proper forms to submit a formal request but did not have sufficient medical information to immediately grant Complainant's request. The record also shows that management explained that Complainant was issued AWOL because she failed to follow leave procedures with respect to annual leave usage and at the time of the leave request, Complainant had already taken a substantial amount of unscheduled leave.

Once management provides legitimate, nondiscriminatory reasons for its actions, the burden shifts to the complainant to show management's proffered reasons were pretextual. To do this, a complainant must provide evidence tending to prove management's reasons are factually baseless/untrue, were not the actual motivation for its decisions, or were insufficient to motivate its actions. Thomas v. Dep't of the Army, EEOC Appeal No. 0120083780 (Jan. 4, 2011).

We find the record devoid of evidence of pretext or that any responsible management official held discriminatory or retaliatory animus toward Complainant. Accordingly, we agree with the Agency in finding insufficient evidence of disparate treatment with respect to the claims alleged.

Denial of Reasonable Accommodation

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). In order to establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002).

The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). The term "position" is not limited to the position held by the employee but may also include positions that the employee could have held as a result of reassignment. Therefore, in determining whether an employee is "qualified," an agency must look beyond the position which the employee presently encumbers. Enforcement Guidance on Reasonable Accommodation.

We note again that the Agency does not dispute that Complainant is a qualified individual with a disability. The Commission finds that Complainant has not established that the Agency failed to provide her with a reasonable accommodation. The Commission notes that a protected individual is entitled to a reasonable accommodation; she is not necessarily entitled to the accommodation of choice. See Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994). The employer may choose among reasonable accommodations so long as the chosen accommodation is effective. U.S. Airways v. Barnett, 533 U.S. 391, 400 (2002). Here, the record is devoid of evidence establishing that the provided accommodations were ineffective. In fact, Complainant even agrees that she could perform the essential functions of her position with the proposed accommodations which she accepted. Accordingly, the Commission finds that Complainant failed to prove that the Agency denied her reasonable accommodation in violation of the Rehabilitation Act. see Eugenia C. v. Environmental Protection Agency, EEOC Appeal No. 0120151806 (Sept. 7, 2017).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507.

In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you.

You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission. The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

February 12, 2025
Date